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In The

Supreme Court of the United States

.....Term, 1976

No. 76-377

MICHAEL LEOPOLD PEPLINSKI,

Petitioner,

v.

STATE OF NORTH CAROLINA

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO REVIEW A DECISION OF THE SUPREME COURT OF NORTH CAROLINA

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Petitioner raises this Writ of Certiorari to review the judgment of the Supreme Court of North Carolina entered on June 17, 1976.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 290 N.C. 236, 225 SE 2d 568 (1976).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

I. Was petitioner deprived of his constitutional right to a fair trial by the conduct of the prosecutor?

II. Was petitioner denied the effective assistance of counsel?

III. Was the facility which was used as a courtroom of such physical limitations that petitioner was denied a right to a fair trial?

IV. Was petitioner denied due process by the introduction of certain evidence?

CONSTITUTIONAL PROVISIONS

Petitioner's allegations raise questions involving the Sixth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner Michael Leopold Peplinski was tried and convicted of first degree murder in June, 1975 in the Superior Court of Robeson County, North Carolina. Petitioner was sentenced to death pursuant to North Carolina General Statutes 14-17. Upon appeal to the North Carolina Supreme Court, that Court affirmed petitioner's conviction and sentence in an Opinion filed June 17, 1976. After the decision of this Court in *Woodson v North Carolina*, No. 75-5491, which held that the North Carolina death sentence was unconstitutional, an administrative order was entered in the Robeson County Superior Court. That order resentenced petitioner to life imprisonment.

Petitioner now seeks review in this Court upon Petition for Writ of Certiorari to review the judgment of the Supreme Court of North Carolina.

STATEMENT OF THE FACTS

Defendant, Mike Peplinski, owned and operated two bars on Gillespie Street in Fayetteville, North Carolina. On 18 January 1975, a local locksmith was called to one of the bars to make a key for a car parked outside. The vehicle was a yellow 1973

Chevrolet station wagon with Florida tags. After making the key, the locksmith gave it to the bartender who, in turn, gave the key to Doris Peplinski who was present at the bar. Doris took the key and drove the car to a house she shared with defendant, while a friend, Tina Aprile, followed in Doris' car.

When the girls arrived at Doris' house, the defendant, David Locklear and Larry Clark were there. Doris gave the keys to defendant and she and Tina left to get something to eat. When they returned, the three men and the yellow station wagon were gone. Early the next morning the two girls went down to the bar and Doris called defendant. Shortly thereafter, the girls drove to Bennettsville, South Carolina where they met the three men at a restaurant. All five of these people spent the night at a motel in Bennettsville. On the morning of 20 January 1975, defendant asked that the girls reserve the room for the men for a second night and then Doris and Tina drove back to Fayetteville. The yellow station wagon was left with the men.

David Locklear insisted that the three men come back to North Carolina on January 20th so that Larry Clark could collect a debt from Hudler Hunt. Hunt lived near Rowland, North Carolina. When the three men arrived, Locklear stayed in the car (yellow station wagon) while Larry Clark and the defendant, went up to the door. The time was approximately 6:30 p.m. The next thing Locklear remembered was hearing shots being fired and seeing Larry Clark and defendant run for the car. Locklear tried to back the car up, but ran into a ditch. Being frightened he jumped from the car and ran into the woods where he stayed until a police helicopter spotted him the next afternoon. He was arrested at that time.

(It seems that prior to trial, Locklear had indicated to the district attorney that he would testify for the State. His earlier recollection of the events of January 20th was substanially different from his trial testimony. At trial, the district attorney attempted to have Locklear declared a hostile witness so that he

could cross examine him. A *voir dire* was held but the trial court refused the district attorney's plea.)

Mrs. Hudler Hunt recalled the 20th of January 1975 vividly. She and her husband, Hudler, were watching T. V. around 6:30 p.m. Both the Hunts are in their late sixties. Mr. Hunt usually carried a great deal of cash on his person, but Mrs. Hunt could not remember how much he had with him that night. The doorbell rang and she went to the door of the porch which opens onto the carport. Switching on the carport light, she peered outside without opening the door. There she saw an Indian, Larry Clark, and a white man who she identified as Mike Peplinski, the defendant. Not knowing the men, she went back to the den to get her husband to answer the door. Mr. Hunt picked up a small gun which he kept at the house and walked to the door. He opened it and defendant told him that he was a prison guard, a prisoner had escaped up the road and that he needed to use the phone. Defendant then walked in and began to dial a number. Mrs. Hunt, standing in the den, wondered why they had come this far to use a phone. There was in fact a phone at the place defendant said the prisoner escaped. She decided she better tell Mr. Hunt and walked toward the carport where he was with Larry Clark. All of a sudden, defendant came up behind her and pulled a tear gas gun from his pocket. As he began to spray it at her face, she pulled her shirt up over her eyes and then heard defendant ask Larry Clark if he had her husband's pocketbook. She looked out from over her shirt and saw defendant aiming and spraying the tear gas at her husband. Then she heard about eight shots fired by both Larry Clark and Mr. Hunt. She did not know who fired first. Shortly thereafter she heard defendant ask if Larry Clark had gotten the pocketbook and then she saw her husband slumped against the carport wall. Mrs. Hunt first picked up a bowl and hit defendant. Then she heard Larry Clark yell that he had been hit and that they had to get out of there. As defendant picked up Larry Clark, Mrs. Hunt went for her rifle. She ran back to the carport, pushed the door open and shot sixteen times at

the fleeing men. She heard one of them being hit by bullets.

The sheriff's office was quickly called and when deputies arrived they noted that Mr. Hunt was dead. Walking around the house, they then found Larry Clark slumped in a hog pen, dead. In his hand, he clutched a Russian Nagant revolver. The revolver contained seven spent cartridges. In his clothes, a pair of gloves and a wallet were found. The wallet contained an I.D. card to one of the bars defendant owned.

In the yard outside the Hunt home, a yellow Chevrolet station wagon was found, stuck in a ditch. The car had Florida tags and had been abandoned with the motor running. Blood was found on the back seat and a bullet hole was seen on the left hand side. The hole was about the size of a .22 rifle bullet. Also found in the car was a .20 gauge shotgun, shells and a pair of hand cuffs.

Early the next morning, a posse was organized to comb the woods around the Hunt house. Later the next afternoon, David Locklear was flushed out and arrested and two days later, defendant was found. He had three wounds in his leg. A search of Locklear's person produced a pair of gloves and a key marked as property of the Bennettsville Motel.

After the body of Hudler Hunt was taken to a morgue, four bullet wounds were found. Two were situated in non-fatal areas. A third penetrated the heart and right lung and a fourth was located in the left side of the abdomen. A medical expert testified that either of the latter two wounds could have caused death. The third and fourth bullets were removed from Mr. Hunt's body and these and the revolver were delivered to the SBI Lab in Raleigh. A firearms expert indicated that after extensive tests, it was his opinion that these bullets were fired from the revolver found in Larry Clark's hand. This same expert also examined a brown work shirt and a T-shirt taken from Mr. Hunt's body. After examining powder burns on the two shirts, the expert was of the opinion that the bullets making

those burns had been fired from extremely close range.

The defendant, Mike Peplinski, offered no evidence.

ARGUMENT

Before beginning argument we respectfully call to the Court's attention the fact that the only constitutional question proffered in the North Carolina Supreme Court was the constitutionality of the death penalty. We therefore believe the points below are not reviewable on a Petition for Certiorari. Should this Court entertain them, we respectfully submit the following arguments.

I. PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL BY THE CONDUCT OF THE PROSECUTOR.

Petitioner brings up three trial occurrences as fuel for this argument. Briefly, they include questions to a law enforcement officer, questions to an accomplice and portions of the closing argument by the district attorney. All three of these events were fully scrutinized and discussed in the opinion of the North Carolina Supreme Court cited above. That Court noted with emphasis and we reassert its position here that the careful and complete instructions of the trial judge cured any error on the above occasions. *United States v McCoy*, 472 F. 2d 704 (6th Cir. 1972), *United States v Kahn*, 381 F. 2d 824 (2d Cir. 1967). We also wish to point out that these instructions were given despite the fact that *they were not requested*.

On the first occasion, the district attorney sought information on an accomplice of petitioner from a law enforcement officer. The latter answered that he knew the accomplice due to his previous retention in the North Carolina prison system. *Immediately*, upon defense counsel's objections, the trial judge sustained the objection, allowed a motion to strike and instructed the jury that they were not to consider any of this testimony.

In the second instance, the testifying accomplice apparently changed his story from the time he first talked to law enforcement officers to the time he took the stand. The district attorney thereupon tried to refresh his memory, asking several questions in this regard. Defense counsel objected to each question and the trial court sustained the objections. Then, on his own motion, the trial judge carefully instructed the jury that unanswered questions and inferences therefrom did not constitute evidence and they were not to consider it. Further, a second similar instruction was given in the final charge to the jury.

The third incident occurred during the district attorney's argument to the jury. At three points he stated that the State had offered the evidence. Putting these remarks in the context of the portion of the argument to which they refer, it is clear that they were not comments on petitioner's refusal to testify. Instead, the district attorney was merely asking the jury to look at all the facts presented and further noting that one of the defense attorneys would argue last. In this regard, he merely asked the jury to remember the facts during the argument.

It is well to emphasize here that *following* all arguments, the trial court carefully and correctly instructed the jury concerning the presumption of innocence and the State's burden of proof. Thus the jury was well appraised as to who had the duty of producing evidence and absolutely no prejudice could have resulted from the district attorney's comments. We also point out that no objections to the above instances were made during the argument itself.

As to the fourth portion of the district attorney's argument attacked by petitioner, we note that not only was there no objection at the time of trial, but also this issue was *not* raised in the court below and should *not* be reviewable now. See *Hill v California*, 401 U.S. 797, 28 L Ed 2d 484, 91 S Ct 1106 (1971).

Even if this Court should decide to entertain this issue, it is clear from the portion of the argument from which it is taken

that it was not prejudicial comment. The district attorney merely quoted from the Bible and then said that when people run from a crime scene, that is a circumstance to consider. Since counsel may argue the law and the facts to the jury, this was entirely permissible. See *State v Noell*, 284 N.C. 670, 202 SE 2d 750 (1974). Further, the trial court gave a complete instruction on flight in its final charge, impressing upon them that the circumstance of flight was not sufficient standing alone to establish petitioner's guilt.

We urge you to agree that none of these instances proffered by petitioner were in the least prejudicial. Any error was cured by the intermediary and final instructions of the trial judge and was thus rendered harmless. See *Schenble v Florida*, 405 U.S. 427, 31 L Ed 2d 340, 92 S Ct 1056 (1972); *Chapman v California*, 386 U.S. 18, 17 L Ed 2d 705, 87 S Ct 824 (1967). Lacking substance, these alleged errors do not warrant a grant of a petition.

II. PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The brief argument here concerns petitioner's court-appointed counsel. The assertion is that the trial attorney should have presented more questions for review in the North Carolina Supreme Court. Without showing why these questions should have been brought to the attention of the court below, petitioner merely lists them here. The first deals with the courtroom facility and the second and third deal with evidentiary rulings in the trial court. The courtroom question is dealt with in our next argument and it is apparent that the trial attorney was correct in choosing not to pursue this question on appeal to the court below. The second deals with a confession by an accomplice. This statement, however, was *never* read to the jury or otherwise introduced into evidence. Thus no ground existed for appeal of that issue. The third question concerns the introduction of evidence and in Argument IV below, it will be shown that this question also is frivolous. There is no basis

for now asserting that this question should have been appealed to the court below.

There is then no showing that petitioner was denied the effective assistance of counsel. Unless the attorney's representation was so lacking that the trial became a farce and a mockery of justice, there is no denial of the right to effective assistance of counsel. *Wilson v Rose*, 366 F. 2d 611 (9th Cir. 1966); *Frand v United States*, 301 F. 2d 102 (10th Cir. 1962); *State v Sneed*, 284 N.C. 606, 201 SE 2d 867 (1974). Certainly in this case, trial counsel did a more than adequate job both at trial and on appeal. No Sixth Amendment infringement has been shown.

III. THE FACILITY USED AS A COURTROOM WAS OF PROPER PHYSICAL DIMENSIONS AND THEREFORE PETITIONER WAS NOT DENIED A FAIR TRIAL IN THIS REGARD.

This procedural issue was neither objected to in the trial court nor raised on appeal in the North Carolina Supreme Court. Since that court has never addressed this issue, it should not be reviewable here. *Hill v California*, supra; *Monks v New Jersey*, 398 U.S. 71, 26 L Ed 2d 54, 90 S Ct 1563 (1970); *Street v New York*, 394 U.S. 576, 22 L Ed 2d 572, 89 S Ct 1354 (1969). We urge you to dismiss this question outright.

Further, this is a meritless question and deserves dismissal on that ground as well. Petitioner has in no way shown that he suffered a denial of constitutional rights by being tried in a renovated Baptist Church. See 21 *Am. Jur.* 2d, Criminal Law §267. And he cites no cases which would command a different result. The citation of *Turner v Louisiana*, 379 U.S. 466, 13 L Ed 2d 424, 85 S Ct 546 (1964) is off base in that that case dealt with the continued communications and association of prosecution witnesses and the jury. The only limitations on the location of the courtroom are found in Article III, §2 and the Sixth Amendment which require that the trial be held where

the offense was committed. There is no assertion here, as there could not be, that the trial was not held in the county where the offense occurred. This question should be immediately dismissed and should certainly not be a basis for granting a petition. cf. *Estes v Texas*, 381 U.S. 532, 14 L Ed 2d 543, 85 S Ct 1628 (1965).

IV. PETITIONER WAS NOT DENIED DUE PROCESS BY THE INTRODUCTION OF CERTAIN EVIDENCE.

Here again, this question is not properly before this Court. The issue of introduction of physical evidence was neither raised nor considered by the North Carolina Supreme Court and should therefore be dismissed now. See *Hill v California*, supra. Over and above this impassable hurdle, the physical evidence attacked here was clearly admissible and presents no basis for an allowance of certiorari.

The State presented evidence that three men, one of whom was petitioner, were together at the home of the victim on the night of the crime and that one of them shot the victim. During the crime scene investigation, several items were taken from the three or their car including a weapon, handcuffs, gloves and a wallet. Clearly this demonstrative evidence was relevant and admissible on questions relating to the event itself as well as the identity of the participants. See *State v Sanders*, 276 N.C. 598, 174 SE 2d 487 (1970); *Caldwell v United States*, 338 F 2d 385 (8th Cir. 1964); 21 *Am. Jur.* 2d, Criminal Law §132.

In the same regard, testimony concerning laboratory tests on the murder weapon and clothing of the deceased were certainly admissible. Proper foundation was laid including qualification of expert witnesses and the detailed exhibition of the steps followed in the testing procedure. See *McCormick on Evidence*, 2nd Ed., §§202, 212.

Petitioner also argues that the responses of the victim's

widow, that the victim usually carried a certain sum of money on his person, were improperly admitted. No reason or justification for this argument is given other than the allegation that this procedure was improper. Clearly, however, this evidence was relevant and admissible. The questions to the widow were not leading nor did the responses constitute hearsay. She merely testified to a fact known from her own first-hand observation. There was no impropriety in the admission of this evidence. And even if this Court should discern some error in evidentiary matters, we strongly believe that it was harmless beyond a reasonable doubt. *Schenble v Florida*, supra. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v United States*, 344 U.S. 604, 619-620, 97 L Ed 593, 73 S Ct 481 (1952).

CONCLUSION

Most if not all of the questions raised here are not properly before this Court. Even if these issues had been raised below, however, no error has been shown in petitioner's trial which would justify the allowance of his petition.

Respectfully submitted,

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